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THE ARIZONA LABOR DECISION

In *Truax v. Corrigan* (1921) 42 Sup. Ct. 124, the Court held unconstitutional an Arizona Statute limiting the use of injunctions in labor disputes. So many and so important are the questions raised by this case that it is possible within the limits of a short discussion to call attention to some of the more important issues only.

The case is thrown into sharper relief by the decision of the same Court only two weeks earlier in *American Steel Foundries v. Tri-City Trades Council* (1921) 42 Sup. Ct. 72, upholding the almost identical provisions of the Clayton Act.[1] The decision in the principal case is

[1] Act of Oct. 15, 1914 (38 Stat. at L. 730, 738).
There is one distinction important on the point of due process between the Arizona Statute (Ariz. Civil Code, 1913, par. 1464) and the Clayton Act, *supra*, for the latter has the provision, not contained in the former: "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." Sec. 20. The Clayton Act was construed in *Duplex Co. v. Deering* (1921) 254 U. S. 443, 41 Sup. Ct. 172. Similar statutes exist in other states. Wash. Laws, 1919, ch. 185; Or. Laws, 1919, ch. 346, upheld in *Green-*

made to rest upon the construction given the Arizona Statute by the Arizona Supreme Court. In discussing the case our interest must necessarily center about the majority opinion of Chief Justice Taft, but mention should be made of the three noteworthy dissenting opinions. Justice Holmes again calls attention to the dangers of a "delusive exactness" in the application of the Fourteenth Amendment and the need of "social experiments" in "the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious" to us; Justice Pitney, with whom concurred Justice Clarke, states clearly and concisely the issue between majority and minority as to the equal protection of the laws; while Justice Brandeis presents a veritable treatise upon the rules of law applicable to disputes between employer and employee in England, in the British Dominions, and in this country.

The Arizona Statute in effect prohibited the issuance of an injunction in a labor dispute "unless necessary to prevent irreparable injury to property or to a property right" for which injury there was no adequate remedy at law; and it further provided that any injunction issued should not prohibit various acts, including "recommending, advising or persuading others by peaceful means" to cease from working or from patronizing or employing any party to a labor dispute. The plaintiffs brought an action for injunctive relief alleging that the defendants were insolvent and unable to respond in damages and that the plaintiffs had no other speedy, adequate remedy, and setting forth certain acts committed by the defendants during the course of a strike against the plaintiffs concerning terms of employment in an endeavor to drive patronage away from the plaintiffs' restaurant. After a trial on the facts judgment was given for the defendants, and this judgment was affirmed by the Arizona Supreme Court.[2] The plaintiffs then commenced another action against slightly different defendants, alleging the same acts and again asking for an injunction. The complaint was

field v. Central Labor Council (1920, Or.) 192 Pac. 783. See also Okla. Rev. Laws, 1910, sec. 3764, upheld in *State v. Coyle* (1912) 7 Okla. Cr. 50, 122 Pac. 243; *Ex parte Schweitzer* (1917) 13 Okla. Cr. 154, 162 Pac. 1134. In the comments on *Present Day Labor Litigation* (COMMENTS (1921) 30 YALE LAW JOURNAL, 280, 404, 501, 618, 736; 31 *ibid.* 86) it was pointed out that while the majority rule is that "peaceful picketing" is not unlawful, a minority hold otherwise, and that statutes legalizing peaceful picketing are open to difficulties of definition. 30 *ibid.* 405, 738. Chief Justice Taft in the *American Steel Foundries* Case and in the principal case states that peaceful picketing is a contradiction in terms which both the Clayton Act and the Arizona Statutes sedulously avoid, but in the former case he held that peaceful persuasion by a single union representative stationed at each entrance to the employer's plant was permissible. But in the principal case Justice Brandeis states that the Court in the former case held peaceful picketing not unlawful. The difference is at least largely one of definition.

[2] *Truax v. Bisbee Local No. 380* (1918) 19 Ariz. 379, 171 Pac. 121.

demurred to, the Court sustained the demurrer and rendered judgment for the defendants. This judgment was sustained by the Arizona Supreme Court.[3] It is this judgment which the Federal Supreme Court now reverses.

The acts complained of by the plaintiffs consisted in part of patrolling in front of the plaintiffs' restaurant with banners and loud appeals, making libellous charges concerning one of the plaintiffs and applying abusive epithets to him, disparaging the service rendered in the restaurant and the character of its patrons, and making threats of injury against would-be patrons. The allegations of the complaint set forth a very drastic form of campaign upon the part of the defendants which could hardly be termed "peaceful." But the Arizona Court held that it was not shown not to have been peaceful, apparently because there was an absence of direct physical force and violence.

The opinion of Chief Justice Taft is divided into two parts; a discussion of the guaranty of due process of law, and a discussion of the guaranty of the equal protection of the laws, each given by the Fourteenth Amendment.[4] As to the first guaranty, the discussion proceeds on familiar lines that the business of the plaintiffs is a property right, and that to hold they are "remediless" where their business has been thus largely destroyed is to deny them due process. With the statements made in this part of the opinion it seems there may be rather general agreement.[5] One perhaps might suggest that the Court, in view of decisions such as those sustaining the Arizona Employers' Liability Act and the New York Rent Law,[6] should attempt to state how far under the police power the relation of employer and employee may be subjected to peculiar regulation by a state legislature.[7] The question of the constitutionality of the Kansas Industrial Court may call forth such a discussion.[8] In any event it seems probable that as yet at least the state legislatures cannot render *remediless* such injuries as those the plaintiffs are alleged to have received.

But it cannot be too strongly emphasized that the decision of this case cannot and is not made to depend upon this part of the Court's opinion. For the Statute deals only with the matter of injunctions[9] and the

[3] *Truax v. Corrigan* (1918) 20 Ariz. 7, 176 Pac. 570.

[4] The words of the Amendment are given in COMMENTS, *infra*, at p. 422.

[5] An interesting subordinate question is how far the federal court is bound by the lower court's finding of facts or interpretation of facts. The Supreme Court seems correct, on principle and on the authority cited, that no constitutional question should depend upon the shadowy distinction between questions of law and questions of fact. See Isaacs, *The Law and the Facts* (1922) 22 COL. L. REV. 1.

[6] *Arizona Employers' Liability Cases* (1919) 250 U. S. 400, 39 Sup. Ct. 553; *Marcus Brown Holding Co. v. Feldman* (1921) 41 Sup. Ct. 465; *Block v. Hirsh* (1921) 41 Sup. Ct. 458.

[7] See a suggestive note in (1922) 22 COL. L. REV. 78.

[8] See COMMENTS (1921) 31 YALE LAW JOURNAL, 75.

[9] See *supra* note 1. The Statute discussed in *Ex parte Schweitzer, supra* note 1,

Arizona Court, whatever it may have said, had before it only a cause of action for injunctive relief.[10] Chief Justice Taft applies the due process clause only to the making "remediless" the injury to the plaintiffs, and says that if the opinion of the Arizona Court "does not withhold from the plaintiffs all remedy for the wrongs they suffered, but only the equitable relief of injunction, there still remains the question whether they are thus denied the equal protection of the laws." Again, he says that "it is beside the point to say that plaintiffs had no vested right in equity relief, and that taking it away does not deprive them of due process of law," for "this does not meet the objection under the equality clause." The decision, therefore, turns entirely upon this latter guaranty, and any reference to the due process clause can only be dictum. The Court does not attempt to put its decision upon the very questionable ground that anyone has a vested interest in a particular kind of remedy.[11]

The effect of this equality guaranty may be considered from two angles: first, does the guaranty require that the plaintiff should here be accorded a primary right to some relief; and second, if that question is answered in the affirmative, must that relief be that of injunction? As to the first, the Chief Justice states that the guaranty was intended to secure equality of protection not only for all but *against all similarly situated;* and he emphasizes the unequal privileges given the defendants, "the distinction here between the ex-employees and other tortfeasors," the "classification based on the relation of an employer, not to an employee, but to one who has ceased to be so, in respect of torts thereafter committed by such ex-employee," the fact that if competing restaurant keepers "had inaugurated such a campaign," "an injunction would necessarily have issued," and generally the lack of equality between the defendants and other wrongdoers.[12] Justice Pitney here takes issue squarely, stating that undue favoritism to the defendants is not discrimination *against* the plaintiffs, of which discrimination alone

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is more drastic than the Clayton Act which as shown above is more drastic than the Arizona Act since the latter applies only to the form of remedy, while the others attempt also to define the primary rights of the parties.

[10] While certain statements of the Arizona Court are broad, it would seem that when it is said that the plaintiffs had no cause of action, the words "for injunctive relief" should be supplied. This is borne out by the statement in the first case that a person attacked by a wrongful speech or writing, "if injured," may recover damages, which is a complete remedy, and equity may not be invoked because of the financial irresponsibility of the plaintiffs and the great number of suits made necessary. See 19 Ariz. at p. 394, 171 Pac. at p. 127.

[11] See *Chicago, R. I. & P. Ry. v. Cole* (1919) 251 U. S. 54, 40 Sup. Ct. 68 (citing cases).

[12] It seems scarcely correct to classify employees striking as to terms and conditions of employment as "ex-employees" especially in view of the holding in the *American Steel Foundries* Case that a labor union as a whole was entitled to be considered an interested party in a strike.

they can complain, that it is as to the plaintiffs no more than a failure to include in the general law a case which for the sake of consistency ought to have been covered, and that to disregard this rule is to transform the equality guaranty into an "insistence upon laws complete, perfect, symmetrical."

Upon this point it is submitted with all deference that Justice Pitney is clearly right and that he is borne out by both the history of the Amendment and the history of its enforcement. It was passed after the Civil War in order to place all people on an equality of rights, to prevent a state from *discriminating against* anyone, but not to require absolute uniformity of law.[13] And it has been construed, in the cases cited by the Chief Justice as well as in others, to permit attacks on state laws only by those *who are discriminated against*.[14] If A has a right against X, B must have a similar right against X, unless differentiated by a proper and reasonable classification. But if B has a right against X, he cannot thereby claim that he must have a similar right against Y or object because Y may be privileged where X is not. Such a complaint can only be made by X. So here if the defendants are unfairly privileged as against competing employers, it is for the latter alone to complain.[15]

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[13] "It (the Amendment) was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the states." *Strauder v. West Virginia* (1880) 100 U. S. 303. Mr. Justice Miller's doubt in *The Slaughterhouse Cases* (1873, U. S.) 16 Wall. 36, whether any state action not a discrimination against the negroes would ever be held to come within the purview of the equality provision has, of course, not been substantiated. For a case where the equality clause should properly apply see COMMENTS, *infra*, at p. 422.

[14] The usual rule that only one injured by a statute can question its constitutionality (12 C. J. 760) applies here, so that only one discriminated against by a statute may question it as denying the equal protection of the laws. *Arizona Employers' Liability Cases* (1919) 250 U. S. 400, 39 Sup. Ct. 553; *Jeffrey Mfg. Co. v. Blagg* (1915) 235 U. S. 571, 35 Sup. Ct. 167; *Hendrick v. Maryland* (1915) 235 U. S. 610, 35 Sup. Ct. 140; *Standard Stock Food Co. v. Wright* (1912) 225 U. S. 540, 32 Sup. Ct. 784; *State v. Case* (1918) 132 Md. 269, 103 Atl. 569. See many cases collected, 12 C. J. 768, 769; 32 L. R. A. (N. S.) 954, note. In the case much relied on by the Court, where an anti-trust act was held invalid because of provisions excepting agricultural products and live stock in the hands of the producer or raiser, the question was raised by one upon whom the unequal duty was placed. *Connolly v. The Union Sewer Pipe Company* (1902) 184 U. S. 540, 22 Sup. Ct. 431. The oft-quoted statement in *Yick Wo v. Hopkins* (1886) 118 U. S. 356, 359, 6 Sup. Ct. 1064, that "the equal protection of the laws is a pledge of equal laws" seems to mean little, but it does put an unfortunate emphasis upon equality in the law itself rather than equality in the protection granted.

[15] Thus in the case cited of *Bogni v. Perotti* (1916) 224 Mass. 152, 112 N. E. 853, which perhaps is the nearest in support of the principal case and is by a court most drastic in its attitude towards labor, it is carefully pointed out that a denial of injunctive relief is a discrimination against another *laborer* who does

If the equality clause is thus construed, the effect is to shift the emphasis from the situation of the defendants to that of the plaintiffs. It is not important then that these "tort-feasors" may be unwisely privileged; the question is whether plaintiffs are denied rights which others similarly situated have. And as plaintiffs have such right as all other employers have, the question is therefore entirely one of the reasonableness of the classification which puts employers into a separate group from other plaintiffs. No cumulative weight against the Statute may be piled up because the plaintiffs' competitors are harmed or the defendants are privileged; the case is purely whether the classifiation made is so unreasonable as to deny plaintiffs rights which those similarly situated enjoy.

As to the reasonableness of the classification a glance at any annotations of the digested cases construing the equality clause is highly suggestive. Here appear cases almost without number sustaining a vast variety of classifications—employers and employees under workmen's compensation and employers' liability acts, employers and employees in particular occupations and businesses (such as those in railroad restaurants distinguished from those in all other restaurants,[16]) retailers who are making bulk sales, those who would use the national flag in advertising, junk-dealers, doctors or undertakers distinguished from other humans, and so on in almost endless combinations[17]—while interspersed are only a comparatively few where the classifications attempted have been held unreasonable.[18] With this as a background should be considered "the state of the art"[19] as shown in Justice Brandeis' com-

not come within the terms of the statute and that as to *such laborer,* the validity of the statute may be attacked. The plaintiffs there were such other laborers.

[16] *Dominion Hotel v. Arizona* (1918) 249 U. S. 265, 39 Sup. Ct. 273.

[17] *N. Y. Central Ry. v. White* (1917) 243 U. S. 188, 37 Sup. Ct. 247; *Arizona Employers' Liability Cases* (1919) 250 U. S. 400, 39 Sup. Ct. 553; *Lamieux v. Young* (1909) 211 U. S. 489, 29 Sup. Ct. 174; *Halter v. Nebraska* (1907) 205 U. S. 34, 27 Sup. Ct. 419; *Rosenthal v. New York* (1912) 226 U. S. 260, 33 Sup. Ct. 27; *Collins v. Texas* (1912) 223 U. S. 288, 32 Sup. Ct. 286; *Keller v. State* (1914) 122 Md. 677, 90 Atl. 603. See 11 U. S. Comp. Sts. Ann. 1916, 14817 *et seq.; 2 ibid.* Supplement, 1919, 2655 *et seq.*

[18] The effect of some of these at least has been weakened by later decisions. Cf. *Connelly v. Union Sewer Pipe Line Company, supra* note 14, with *Carroll v. Greenwich Ins. Co.* (1905) 199 U. S. 401, 26 Sup. Ct. 66, and *Otis v. Parker* (1903) 187 U. S. 606, 23 Sup. Ct. 168; *Gulf, C. & S. F. Ry. v. Ellis* (1897) 165 U. S. 150, 17 Sup. Ct. 255 (attorneys' fees on small claims against a railroad) with *Atchison, T. & S. F. Ry. v. Matthews* (1899) 174 U. S. 96, 19 Sup. Ct. 609, and *Seaboard Air Line Ry. v. Seegers* (1907) 207 U. S. 73, 28 Sup. Ct. 28; and *Cotting v. Kansas City Stock Yards Co.* (1901) 183 U. S. 79, 22 Sup. Ct. 30, with *St. Louis Consol. Coal Co. v. Illinois* (1902) 185 U. S. 203, 22 Sup. Ct. 616, and *McLean v. Kansas* (1909) 211 U. S. 539, 29 Sup. Ct. 206.

[19] Cf. *Muller v. Oregon* (1908) 208 U. S. 412, 28 Sup. Ct. 324, saying that in patent cases counsel usually open by discussing the state of the art, and referring to Mr. Brandeis' brief then before the Court, which collected authorities showing

prehensive survey of the views of courts and legislatures on this problem, demonstrating a widely-held belief that the relation of employers to their employees deserves and requires special treatment.[20] Finally should be considered the well-settled rule that the act must be sustained unless the classification is clearly unreasonable.[21] It is hard to follow the Court to its conclusion that this classification is clearly unreasonable. The decision is regrettable.

As to the necessity of granting the remedy of injunction, Justice Brandeis again collects authority to show the discretionary character of this particular form of remedy. He shows that it is refused where there is an adequate remedy at law, and also in cases of contracts for personal service, of actionable libels, of mere political rights, where the operations of the police department are involved, in cases of nuisance where the doctrine of balance of convenience or comparative equities obtains, where a remedy is expressly given for a statutory right, and where Congress has prohibited the use of injunctions as in the matters of proceedings in state courts, and the illegal assessment and collection of taxes.

Many people, including some good lawyers, have felt that the injunction was not a proper remedy for a labor dispute. It has not been long used in this country in such disputes and in England it is infrequently employed, resort being had to the criminal law or to actions for damages.[22] However much we may be convinced of its value, it does not seem a necessity to the adjustment of labor difficulties. One may regret, therefore, that an experiment along the lines advocated by so many persons which was to be tried in a limited way in Arizona and

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the course of legislation upon hours of labor for women, the question then at issue.

[20] Chief Justice Taft suggests that it is a far cry from the classification of employer and employee under workmen's compensation acts to the classification in the principal case. But before the former acts became so familiar to us, which would have seemed the greater step, to impose upon a class "liability without fault" or to deny certain persons in certain cases the equitable remedy of injunction? Cf. Justice McKenna and Justice McReynolds dissenting in *Arizona Employers' Liability Cases, supra* note 14. COMMENTS (1919) 29 YALE LAW JOURNAL, 225. Again the Chief Justice says as to classification: "When fundamental rights are thus attempted to be taken away, however, we may well subject such experiment to attentive judgment." But this "attentive judgment" should be only to determine the existence of a reasonable distinction between those included and those excluded from the operation of the Statute, not to pass on legislative policies. Earlier the Chief Justice seems, impliedly at least, to have admitted that an injunction is not a fundamental right.

[21] *Dominion Hotel v. Arizona* (1919) 249 U. S. 265, 268, 39 Sup. Ct. 273, 274.

[22] See authorities collected by Justice Brandeis, who points out that the injunction did not secure recognition as a remedy in labor disputes in this country until 1888. See also Gregory, *Government by Injunction* (1898) 11 HARV. L. REV. 487, and statement by Mr. Frank Morrison in 1921 quoted in COMMENTS (1921) 31 YALE LAW JOURNAL, 86.

other states has thus been prevented, just as one would regret if the Kansas experiment of the industrial court should be prematurely snuffed out.[23]

A final question is as to the effect of the decision. The case is remanded for the issuance of an injunction if the facts alleged are proved.[24] It appears that the real difference between the State and the Federal Courts is as to the interpretation of the facts—the application of the Statute to the facts. Had the Arizona Court held the defendants' acts to have been not peaceful, the Statute would not have applied. The Supreme Court distinguishes its support of the Clayton Act in the *American Steel Foundries* Case from this case on the ground not only that there is no requirement of equality as to Congressional action, but also because of the construction of this Statute made by the State Court. By this construction the Federal Court is bound.[25] But in view of the usual rule as to the effect of judgments, a decision of the unconstitutionality of an act is only binding in the very case made and anyone may raise the question again in another case.[26] There is thus legally no distinction between a decision as to a statute which appears fair on its face but is unconstitutionally applied, and one not fair on its face. In either case the decision only affects the situation then before the

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[23] See *supra* note 8.

[24] The Court's conclusion is that "if the evidence sustains the averments of the complaint, an injunction should issue as prayed." But the injunction *prayed* for was, according to the lower court, one "prohibiting the defendant from attending at or near the plaintiffs' place of business for the purpose of *peaceably* communicating the existence of a strike pending, and of *peaceably* persuading any person from patronizing the plaintiffs, or from recommending, advising, or persuading others so to do." 20 Ariz. at p. 9, 176 Pac. at p. 571. The Court had decided, in spite of Justice Holmes' view to the contrary, that the invalidity of this Statute did not render invalid the entire Statute giving the Arizona courts power to issue injunctions. This point is not discussed herein. See *Davis, Director General of Railroads v. Wallace* (Jan. 19, 1922) U. S. Sup. Ct., Oct. Term, 1921, No. 329.

[25] *Lindsley v. Natural Carbonic Gas Co.* (1911) 220 U. S. 61, 73, 31 Sup. Ct. 337, 338; *Hill v. Dockery* (1903) 191 U. S. 165, 24 Sup. Ct. 53. But there are statements that the Supreme Court is not bound by the lower court's statement of the meaning of the Statute. *Yick Wo v. Hopkins, supra,* note 14; *Atchison, T. & S. F. Ry. v. Mathews* (1899) 174 U. S. 96, 100, 19 Sup. Ct. 609, 611; *Hodge v. Muscatine County* (1905) 196 U. S. 276, 25 Sup. Ct. 237. Again a law fair on its face may be so improperly applied as to violate the Constitution. *Yick Wo v. Hopkins, supra,* note 14; *Reagan v. Farmers Loan & Trust Co.* (1894) 154 U. S. 362, 390, 14 Sup. Ct. 1047, 1051. Cf. Pound, J., dissenting in *People v. Doyle* (1921) 232 N. Y. 96, commented on in CURRENT DECISIONS, *infra* at p. 450. Any apparent inconsistency here should, it seems, be reconciled by recognizing the rule stated in the text that the decision of unconstitutionality binds only the parties to the case and their privies, and hence applies only to the application of the Statute made to the particular facts in issue.

[26] *Middleton v. Texas, P. & L. Co.* (1919) 249 U. S. 152, 39 Sup. Ct. 227; *Shephard v. Wheeling* (1887) 30 W. Va. 479, 4 S. E. 635; *Rutten v. Paterson* (1906) 73 N. J. L. 467, 64 Atl. 573; *In re Wine* (1920, Fla.) 83 So. 627.

court. Practically, however, in the latter case, the matter will not again be litigated, and the Statute may be treated as void.[27] Hence we may properly emphasize, as does the Supreme Court, that it is here definitely the application of the Statute made by the State Court which is found objectionable. There is no reason why the State Court may not on another set of facts make its views conform to those now promulgated as the law of the land.[28] C. E. C.

FOREIGN EXCHANGE TRANSACTIONS

Foreign exchange transactions have become of novel importance during the last six years and a great amount of litigation has produced confused decisions. The war, the fluctuating rates of exchange, and the apparent position of the United States as the world's bankers have contributed to a situation that demands legal clarity and certainty.

A large part of the business of foreign exchange consists of selling credits available at a foreign point to those who desire to make payments at that point. The purchaser of foreign exchange seldom buys currency; he buys credit, a chose in action, made available abroad by an agent or correspondent of the seller. The draft which may be delivered to the purchaser is only a piece of paper evidencing the transaction; the message which may be sent to the seller's correspondent by mail or by cable is merely part of the mechanics of making the credit available.[1] The actual money paid by the purchaser is not transmitted to the foreign point. It becomes the seller's property and he does not hold it as trustee or agent until the payment of the credit is effected.[2]

The transactions are of various forms, each governed to a large extent by the terms of a special contract. In the case of a draft payable in a foreign country, the seller draws an order on his correspondent, warranting that it will be accepted and paid when presented at the foreign point. The buyer is usually given the draft and undertakes the duty and risk of forwarding it abroad by mail. The cable transfer is a much faster method. The seller agrees to establish forthwith by means of a cable message a credit in favor of a payee abroad designated by the purchaser. The seller generally specifies in the contract that he will not be responsible for errors or delays in the transmission of the message unless caused by him. The seller of a cable transfer ordinarily undertakes to notify the payee abroad, designated by the purchaser, that the credit has been established and may undertake to hand over

[27] *Norton v. Shelby County* (1886) 110 U. S. 425, 6 Sup. Ct. 112.

[28] *Middleton v. Texas, P. & L. Co., supra* note 26.

[1] It seems clearly erroneous to consider the draft as the thing bought. But see (1921) 35 HARV. L. REV. 88.

[2] *Legniti v. Mechanics & Metals National Bank* (1921) 230 N. Y. 415, 130 N. E. 597.

foreign currency to the payee. The foreign money order is still another method whereby credits are made available abroad, and is the method utilized by steamship and express companies for the transmission of small sums of money to foreign points. The purchaser pays to the steamship or express company, which sells the money order, a sum in United States currency which represents the equivalent at the existing rate of exchange of a certain amount of foreign money, plus, perhaps, a small charge for the service to be rendered. The seller informs its correspondent abroad of the sale of each foreign money order by mail, and the correspondent in turn usually purchases a foreign *postal* money order for the agreed amount of foreign money and mails it to the designated payee.

Is the transaction when entered into a sale of a credit, a contract to sell a credit, or a simple executory contract of service to establish a credit? The mere act of drawing a draft does not operate as an assignment of a credit, and therefore can not of itself be a sale of a credit. Is the transaction a contract to sell? Suppose the seller has not a credit at the foreign point at the time he contracts to sell one. He may merely have the means of obtaining it.[3] It is submitted, therefore, that the transaction may be a simple executory contract to create a credit, which is not within the Statute of Frauds.[4] In a recent case,[5]

[3] "These are banker's drafts or checks and are accepted as the equivalent of so much cash because confidence is reposed in the standing of the banker issuing the drafts and his credit if not his cash balance with his correspondent bank on which the draft is drawn." Hough, *Practical Exporting* (1920) 473. Mr. Franklin Escher, speaking of commercial credit transactions, says: "As in the case of foreign loans previously described, the banker's credit and the banker's credit alone is the basis of the whole operation. The London bank never pays out any actual cash—it merely 'accepts' a four months' sight draft, knowing that before the draft comes due and is presented at its wicket for payment, 'cover' will have been provided from New York." *Elements of Foreign Exchange* (1910) 155. See also NOTES (1919) 19 COL. L. REV. 322.

[4] If the credit is not in existence at the time the transaction is entered into, this is an assignment of a chose in action which is to be acquired in the future. Such assignments are not enforceable unless the chose in action has potential existence, that is, unless there is some contract agreement under which the chose in action will in all probability come into existence in the future. *O'Niel v. Kerr Co.* (1905) 124 Wis. 234, 102 N. W. 573; see dissenting opinion in *Equitable Trust Co. v. Keene* (1921) 195 App. Div. 384, 186 N. Y. Supp. 468. Although the parties generally speak of the transaction as a "sale," as a matter of fact, until the credit has been established, all that the buyer acquires is an obligation of the seller to secure credit at the foreign point. See Stone, *Some Legal Problems Involved in the Transmission of Funds* (1921) 21 COL. L. REV. 507, 513.

[5] *Equitable Trust Co. v. Keene, supra* note 4. The case is now on appeal. The Court was influenced by the statement in *Strohmeyer & Arpe Co. v. Guaranty Trust Co.* (1916) 172 App. Div. 16, 157 N. Y. Supp. 955, that "the seller engages that he has a balance at the point on which payment was ordered." It is submitted that this was merely the stipulation of the parties in that case. The seller was shown actually to have had a credit at the time the transaction was entered into.

however, the court assumed that the credit was in existence at the time the transaction was entered into and held that an agreement to sell a cable transfer of exchange was an agreement to sell an *existing* chose in action and had to be in writing. Under the facts in the case it may very well have been a simple executory contract for future service.

In discussing the measure of damages when payment of the credit has not been effected, an analysis of the cases seems advisable. Many of the decisions seem to be in conflict, but it is believed that they may be distinguished. If the seller negligently or wilfully fails to create the credit, or if his correspondent refuses to honor the draft or to act upon a cable transfer, it is clear that the buyer can recover the dollars paid.[6] If, however, the seller and his correspondent are not negligent, but the establishment of the credit has been prevented by some unforeseen circumstance and the seller is unable to communicate with his correspondent or the correspondent is unable to locate the payee, the situation is more difficult. It seems unfair to compel a seller who has acted with reasonable care and attempted to effect payment of the credit through his correspondent to bear a loss due to the depreciated value of the credit. On the other hand it is equally unfair to let the seller profit from the transaction if he still has the purchaser's money and has not acquired a credit for him. Unless, therefore, the seller has appropriated a credit to the contract—that is, either procured a foreign credit for the purchaser in reliance on the contract, or else notified the correspondent to transfer part of an existing credit to cover the contract in question—the purchaser should be permitted to rescind the contract and recover all moneys paid.[7] The seller is not responsible for a mere reasonable delay in the establishment of the credit, however.[8] Generally the credit has been appropriated to the contract, but payment has been prevented or rendered impossible through no fault of the seller. The purchaser can then recover only the value of the credit at the time

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The statement has been quoted in several other cases and is the cause of much confusion.

[6] *Gross v. Mendel* (1916) 171 App. Div. 237, 157 N. Y. Supp. 357, affirmed without opinion (1918) 225 N. Y. 633, 121 N. E. 871; *Beecher v. Cosmopolitan Trust Co.* (1921, Mass.) 131 N. E. 338. Another case allows the drawee of a dishonored draft to recover only at the current rate of exchange on the date of demand, but there was a statute which specifically so provided. *American Express Co. v. Cosmopolitan Trust Co.* (1921, Mass.) 132 N. E. 26, applying Mass. Rev. Laws, 1902, ch. 73, sec. 9. For a discussion of the question of damages in foreign currency, see COMMENTS (1921) 31 YALE LAW JOURNAL, 198.

[7] *Atlantic Communication Co. v. Zimmerman* (1918) 182 App. Div. 862, 170 N. Y. Supp. 275; *Pfotenhauer v. Equitable Trust Co.* (1921, Sup. Ct.) 115 Misc. 396, 188 N. Y. Supp. 464.

[8] *Strohmeyer & Arpe Co. v. Guaranty Trust Co., supra* note 5. How long a delay is reasonable has not been determined but it is conceivable that the purchaser would be justified in refusing to accept a credit which was established long after the time contemplated by the contract.

of demand,[9] unless payment had been expressly guaranteed.[10] The seller must notify the purchaser within a reasonable time however, of his inability to effect the payment. The burden of explaining the failure to establish the credit is on the seller, though the court will take judicial notice of war conditions.[11]

THE DECLARATORY JUDGMENT CONSTITUTIONAL

The decision of the Supreme Court of Kansas in *State, ex rel. Hopkins, Attorney-General v. Grove* (1921, Kan.) 201 Pac. 82, holding constitutional the Statute authorizing the courts of that State to render declaratory judgments, will give satisfaction to the several critics of the decision of the Michigan Supreme Court which held a similar statute in that State unconstitutional.[1] A Statute of Kansas provided that no employee of a railway company holding a franchise granted by or a contract with a city shall, under penalty, hold any city office. Grove, a boilermaker employed by the Missouri Pacific Railroad Company, was elected a member of the Board of Commissioners of the City of Wichita, Kansas. He as well as the Attorney-General were apparently in doubt as to his capacity to hold office, not being certain whether the Railroad had a franchise from or contract with the City. Had there been no provision for a declaratory judgment in Kansas, practically the only way for the elected officer to have tested his legal capacity to hold

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[9] *Fliker v. State Bank* (1916, Mun. Ct.) 94 Misc. 609, 159 N. Y. Supp. 730; *Katcher v. American Express Co.* (1920) 94 N. J. L. 165, 109 Atl. 741; *Sommer v. Taylor* (1921, Mun. Ct.) 190 N. Y. Supp. 153; see Fraenkel, *Some Aspects of the Law Relating to Foreign Exchange* (1920) 20 COL. L. REV. 832. In *Oshinsky v. Taylor* (1918, Sup. Ct.) 172 N. Y. Supp. 231, it does not appear from the facts whether the credit had been appropriated to the contract but the purchaser was allowed to recover only the value of the credit at the time of demand. In *Safian v. Irving Nat. Bank* (1921, Sup. Ct.) 116 Misc. 647, the seller appropriated foreign money to the contract, but payment to the payee designated by the purchaser was not effected because of a mistake in the address made by the cable company. In spite of the fact that the seller had contracted specifically not to be liable "for any loss or damage in consequence of any delay or mistake in transmitting the message or for any cause beyond our control," the Court held that the purchaser could rescind the contract and recover the money he had paid. The dissenting opinion points out the inconsistency of this.

[10] *Wasserman v. Irving National Bank* (1920, Mun. Ct.) 114 Misc. 704, 187 N. Y. Supp. 243.

[11] *Oshinsky v. Taylor, supra* note 9; *Katcher v. American Express Co., supra* note 9.

[1] *Anway v. Grand Rapids Ry.* (1920) 211 Mich. 592, 179 N. W. 350. Criticized in NOTES (1920) 19 MICH. L. REV. 86; COMMENTS (1920) 30 YALE LAW JOURNAL, 161; NOTES (1921) 21 COL. L. REV. 168; Schoonmaker, *Declaratory Judgment* (1920) 5 MINN. L. REV. 172; Dodd, *Michigan Declaratory Judgment Decision* (1920) 6 A. B. A. JOUR. 145; O'Donnel, *Michigan Declaratory Judgment Decision* (1921) 7 A. B. A. JOUR. 141; Rice, *The Constitutionality of the Declaratory Judgment* (1921) 28 W. VA. L. QUART. 1.

the office would have been to enter upon the office and incur the penalty, should his view of the validity of his title have proved erroneous. Being apparently undesirous of courting this danger, he refrained from assuming office, a decision which was perhaps unjust to the community and himself. The possibility of obtaining a declaratory judgment resolved what might have been an awkward situation. The Attorney-General, who contested the defendant's title to office, brought an action for a declaration that the defendant was under a disability to hold the office to which he had been elected, and the defendant pleaded the unconstitutionality of the Statute authorizing declaratory judgments as well as a denial of his ineligibility.

The Kansas Court in holding the Statute constitutional first pointed out the difference between the Michigan and the Kansas Act, in that the latter was limited in its application to "cases of actual controversy." While the Michigan decision relied in part upon the fact that the case before it was not an actual controversy, it based its decision upon grounds which, if sound, the Kansas Court admitted would be fatal to the constitutionality of the Kansas Act. These grounds were that the function of rendering declaratory judgments was not judicial, because such a judgment was not final, but advisory, or moot, and that a valid judgment of a court required "execution." The Kansas Court, after examining these grounds comes unanimously to the conclusion that the view of the Michigan court "appears to us to be unsound, and to be the result of confusing declaratory judgments with advisory opinions and decisions in moot cases." The Court adds:

"It is hardly conceivable that any fundamental principle of our government, beyond legislative control, prevents two disputants, each of whom sincerely believes in the rightfulness of his own claim, but each of whom wishes to abide by the law, whatever it may be determined to be, from obtaining an adjudication of their controversy in the courts without one or the other first doing something that is illegal (in the case of the present defendant criminal) if he is mistaken in his view of the law."

Thus the minority in the Michigan case and the critics who sustained them are vindicated, and the obstruction to this useful reform, temporarily interposed by the Michigan decision, now judicially adjudged unsound, is probably removed.

The case raises a further question which deserves consideration. Ever since the Michigan decision was handed down, the draftsmen of similar bills in other states have sought to avoid its blighting effect by limiting the operation of the statute to "cases of actual controversy." Whether this limitation is essential is questionable. While most cases will necessarily involve controverted issues, the declaratory judgment has served a useful purpose in England and other countries by removing uncertainty from legal relations where only a *potential* controversy

was apparent to the court. Thus, the removal of clouds from title does not require an actual present controversy or contested issue nor does the construction of a will[2] or the directions sought by a trustee.[3] Nor does the decision in *Muskrat v. United States*[4] justify the belief that an actual present controversy is essential to the declaratory judgment. In that case, Congress adopted the unusual measure of authorizing certain named individuals, including Muskrat, to prosecute an appeal from the Court of Claims to the Supreme Court to test the constitutionality of an Act of Congress. It did not appear that Muskrat had any interest whatever in the case, a fact which sufficed to enable the Court to decline to exercise jurisdiction. In addition, it did not appear that there was any actual or potential controversy, nor did the judgment have any known parties upon which it could operate. Such circumstances do not warrant the conclusion that a party whose legal relations are in serious doubt which requires removal and gives rise to a potential controversy or litigation may not appeal to a court for a declaratory judgment, citing all parties who might be opposed or whom the court considers it desirable to cite, and obtain a final adjudication of his legal relations, as binding as any other judgment. If insufficient or improper parties are cited, the court will simply decline to make the declaration, and of course, the judgment will not be binding upon interested parties who were not cited or did not appear. If, in the instant case, Grove had merely announced his doubt as to his capacity to hold office instead of asserting his privilege, it is not apparent why a declaratory judgment could not have been rendered, as a matter of constitutional law. It does not seem necessary to the constitutionality of a declaratory judgment, any more than it is necessary to other judgments in equity, that there must be, as the Kansas Act provides, an "actual antagonistic assertion and denial of right."

The declaratory judgment procedure is now in force in extended form in New York, Connecticut, California, Wisconsin, Kansas, and Florida.[5] Bills for its adoption are pending in Congress (for the

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[2] *In re Drake* [1921] 2 Ch. 99.

[3] *In re Badische Co. Ltd.* [1921] 2 Ch. 331.

[4] (1911) 219 U. S. 346, 31 Sup. Ct. 250. It is on this case that the Michigan court in the *Anway* case, *supra* note 1, largely relied, and it seems to have alarmed some of the proponents of declaratory judgment legislation. Mr. Rice, in his article in the *West Virginia Law Quarterly, supra* note 1, suggests that the Kansas requirements for an "actual antagonistic assertion and denial of right" was incorporated merely to make the statute "fool-proof"—in view of the *Anway* case. It may serve to bar the rendering of the judgment where the defendant, duly served, fails to appear and make answer. This would be an unfortunate limitation of a court's customary jurisdiction.

[5] New York, Civil Practice Act, sec. 473, Laws, 1920, ch. 925, sec. 473; Connecticut, Pub. Acts, 1921, ch. 258; California, Act of May 27, 1921, now embodied in Code of Civ. Proc. secs. 1060, 1061, 1062; Wisconsin, Laws, 1919, ch. 242, sec.

federal courts) and in several state legislatures. Very probably it will be revived in Michigan. The draft of a Uniform Act is before the Commissioners on Uniform State Laws. The next few years, therefore, are likely to witness a generous recourse to this method of determining legal relations and to afford us an opportunity to establish the efficacy of this reform in the administration of justice.

E. M. B.

HAS AN ALIEN THE PRIVILEGE OF FREE SPEECH?

In the recent case of *State v. Sinchuk* (1921) 96 Conn. 605, 115 Atl. 33, the Supreme Court of Connecticut held that the guaranties of the privileges of free speech and of assembly contained in the Bill of Rights of the State Constitution have no application to aliens, but are privileges conferred upon citizens alone. Under this interpretation of the State Constitution the defendant, an alien, was not permitted to attack the constitutionality of the State Sedition Act,[1] for, not being possessed of any political privileges under the Constitution it would be impossible for him to show that the Statute in question had deprived him of the privilege of free speech.[2] This decision may be open to objection for two reasons: (1) the language of the sixth section of the Connecticut Bill of Rights probably does not justify its restriction to citizens alone; and (2) the decision perhaps deprives the defendant of the equal protection of the laws in violation of the first section of the Fourteenth Amendment to the Federal Constitution.[3]

3687 m, p. 253; Kansas, Laws, 1921, ch. 168; Florida, Laws, 1919, ch. 7857, No. 75, p. 148.

The Superior Court of Los Angeles County, California, Burnell, J., has just held the California Statute unconstitutional, relying principally on the unsound decision of the Michigan court in the *Anway* case. The Court was not apparently aware of the Kansas decision. The case is, it is understood, now on appeal to the California Supreme Court. *Newberry v. Newberry,* reported in the San Francisco Recorder, Dec. 30, 1921.

[1] Conn. Pub. Acts, 1919, ch. 312, entitled "An Act Concerning Sedition." The act declares a punishment for speaking or publishing any disloyal, scurrilous, or abusive matter concerning the form of government of the United States, its military forces, flag or uniform, or any matter intended to bring them into contempt, or which creates or fosters opposition to organized government. The still more drastic Act (Conn. Pub. Acts, 1919, ch. 191) against advocating in public any doctrine intended to injuriously affect the state or federal government was not involved. See COMMENTS (1919) 29 YALE LAW JOURNAL, 108. The constitutionality of these statutes as to citizens is yet to be determined.

[2] Before any law can be attacked by any person on the ground that it is unconstitutional it must be shown that its enforcement has violated or will violate his constitutional privileges. *Hooker v. Burr* (1904) 194 U. S. 415, 24 Sup. Ct. 706; *Citizens' National Bank v. Kentucky* (1910) 217 U. S. 443, 30 Sup. Ct. 532.

[3] ". . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const. Amendments, art. 14, sec. 1.

There is no doubt that sections two,[4] five,[5] and sixteen[6] of the Connecticut Bill of Rights have no application to aliens, but, as pointed out by Chief Justice Wheeler in his dissenting opinion, the wording of the sixth section is sufficiently broad to afford aliens the privilege of free speech This section provides that "no law shall ever be passed to curtail the liberty of speech or of the press." It is a cardinal rule of constitutional construction that unless the wording of a particular provision either specifically or by logical intendment restricts its guaranties to a certain class, it will be construed as applying to everyone, whether citizens or not.[7] The majority, in the instant case, read sections five and six together, and limited the broad language of section six by the specific limitations of section five, which applied to citizens alone. This seems a rather strained and unjustifiably narrow construction, quite contrary to the rule of constitutional construction just mentioned. In some cases the courts have held that an alien has no liberty of speech, but these instances can easily be distinguished from the instant case. In *Goldman v. Reyburn,*[8] where this result was reached, the Pennsylvania Constitution specifically limited the guaranty of free speech to citizens, and in *United States v. Williams,*[9] a case often cited as holding that an alien does not possess this privilege, the Court merely decided that the exclusion of alien anarchists from the United States by act of Congress[10] does not constitute a violation of the privilege of free speech, since Congress has the power to exclude aliens and to prescribe the terms and conditions on which they enter. There is apparently no authority to support the Connecticut Court in holding that an alien is not protected by a constitutional guaranty so general in its scope as the sixth section of the Connecticut Bill of Rights.

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[4] Conn. Constitution, art. 1, sec. 2. Referring to this section, Beach, J., in the principal case said: "The right affirmed by this section is the right of the people to alter their form of government. It is because it is their own and instituted by themselves for their own benefit that they have the right to alter it. The proposition that aliens have an undeniable and indefeasible right to alter our form of government will hardly bear statement."

[5] "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty." Conn. Constitution, art. 1, sec. 5. Aliens can not enjoy the guaranties of this section as they are specifically restricted to citizens.

[6] "The citizens have a right, in a peaceable manner, to assemble for their common good, and apply to those invested with the powers of government, for redress of grievances, or other purposes, by petition, address or remonstrance." Conn. Constitution, art. 1, sec. 16. The guaranties of this section like those of section five are specifically restricted to citizens alone.

[7] *Truax v. Raich* (1915) 239 U. S. 33, 36 Sup. Ct. 7; *Yick Wo v. Hopkins* (1886) 118 U. S. 356, 6 Sup. Ct. 1064; *Ex Parte Case* (1911) 20 Idaho, 128, 116 Pac. 1037.

[8] (1909) 36 Pa. Co. 581. [9] (1904) 194 U. S. 279, 24 Sup. Ct. 719.

[10] The Alien Immigration Act. Act of March 3, 1903 (32 Stat. at L. 1213).

It is also rather difficult to disagree with the dissenting Chief Justice in his contention that the construction placed upon the Connecticut Constitution by the majority denies the defendant the equal protection of the laws guaranteed by the Fourteenth Amendment. That this is due to aliens as well as citizens seems to be universally recognized.[11] It is not easy to understand how a state, having no power to exclude aliens[12] or to impose burdensome regulations upon their entry,[13] can arbitrarily discriminate[14] against them after they have come within its jurisdiction. That the Connecticut Supreme Court did discriminate between alien and citizen in denying the defendant the privilege of free speech cannot be denied, and in so doing it appears that it may have transgressed one of the limitations placed upon the power of the State by the Fourteenth Amendment.[15]

It should be noted that in the instant case the particular language alleged to have been used by the aliens in violation of the Statute was not before the Court but only the general constitutional question.

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[11] *Truax v. Raich, supra* note 7; *Yick Wo v. Hopkins, supra* note 7; *Templar v. State Examiners* (1902) 131 Mich. 254, 90 N. W. 1058; *Ex Parte Kotta* (1921, Calif.) 200 Pac. 957; *State v. Montgomery* (1900) 94 Me. 192, 47 Atl. 165. To quote from the opinion in *Yick Wo v. Hopkins, supra* note 7; "These provisions (referring to due process and and equal protection of the laws) are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, *or of nationality.*" (Italics ours.)

[12] *State v. The Steamship "Constitution"* (1872) 42 Calif. 578; *Lin Sing v. Washburn* (1862) 20 Calif. 534.

[13] *Passenger Cases* (1849, U. S.) 7 How. 283; *Ex Parte Ah Cue* (1894) 101 Calif. 197, 35 Pac. 556.

[14] A state has the power to discriminate between citizens and aliens in the distribution of its own resources. The common property of a state belongs to the people of the state and citizens may be preferred in its distribution. *McCready v. Virginia* (1876) 94 U. S. 391; *People v. Crane* (1915) 214 N. Y. 154, 108 N. E. 427; *Atkin v. Kansas* (1903) 191 U. S. 207, 24 Sup. Ct. 124; *Ex Parte Gilletti* (1915) 70 Fla. 442, 70 So. 446.

[15] It is undoubtedly true that freedom of speech is one of the so-called "fundamental rights" safeguarded by the first section of the Fourteenth Amendment. "It should be observed of the terms (as used in the Fourteenth Amendment) 'life,' 'liberty,' and 'property' that they are representative terms and are intended and must be understood to cover every right to which a member of the body politic is entitled under the law. . . .The rights thus guaranteed are something more than the mere privileges of locomotion; the guarantee is the negation of arbitrary power in every form which results in the deprivation of right. . . . . It would be absurd, for instance, to say that arbitrary arrests were forbidden, but that the *freedom of speech,* the freedom of religious worship, the right of self defence against unlawful violence, the right freely to buy and sell as others may, or the right in public schools found no protection here." (Italics ours.) 2 Story, *The Constitution* (5th ed. 1891) sec. 1950. Also see, *Marx and Haas Jeans Clothing Company v. Watson* (1902) 168 Mo. 133, 67 S. W. 391; *Gillespie v. People* (1900) 188 Ill. 176, 58 N. E. 1007.

SERVICE BY PUBLICATION IN SUIT INVOLVING EQUITABLE ASSIGNMENT OF INSURANCE POLICY

A took out a life insurance policy in the defendant company with his sister as beneficiary. Under the terms of the policy A was privileged to change the beneficiary without the assent of the beneficiary herself. Subsequently, in consideration of marriage, A agreed to substitute as beneficiary the plaintiff, his future wife. The policy was delivered to the plaintiff who thereafter paid the premiums. A died without having the policy changed. The plaintiff sued in equity to have herself declared the equitable owner of the policy and to have the proceeds paid to her, in which suit the defendant company and the beneficiary, a resident of Austria, who was served by publication, were made parties defendant.

The trial court dismissed the complaint,[1] but the decision was reversed by the Appellate Division.[2] The appellate court relied upon a decision of the Court of Appeals, *Morgan v. Mutual Benefit Life Ins. Co.*[3] In the latter case A took out a policy for $5,000, which was payable to his wife and, in case she died before him, to their children. Being unable to pay the premiums A and his wife assigned the policy by way of security to B, who paid the premiums, $4,500 in all. In a suit by B's administrator against the company and A's children, who had become beneficiaries under the policy and who were non-residents of the state and were served by publication, to impress a lien upon the policy for the amount of the premiums advanced, it was held that the action was in the nature of a proceeding *in rem* and that jurisdiction over the children had been acquired.

When the instant case came before the Appellate Division a second time the Court reversed itself by a vote of three to two,[4] the majority of the judges feeling constrained to do so by the decision of the Court of Appeals in the case of *Hanna v. Stedman*,[5] which had been rendered in the meanwhile. The proceeding in the *Hanna* Case was one of interpleader and it was held that jurisdiction could not be acquired over the non-resident claimant by publication.

It is submitted that the decision upon the first appeal in the *Schoenholz* Case was correct and that the *Hanna* Case is not opposed.

The principal case raises two questions of a fundamental character: (1) What solution does sound policy demand? (2) Is it possible to reach such solution under the existing law? As regards the first of

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[1] *Schoenholz v. New York Life Ins. Co.* (1919, Sup. Ct.) 106 Misc. 340, 175 N. Y. Supp. 684.

[2] (1920) 192 App. Div. 563, 183 N. Y. Supp. 251.

[3] (1907) 189 N. Y. 447, 82 N. E. 438.

[4] (1921, App. Div.) 188 N. Y. Supp. 596.

[5] (1921) 230 N. Y. 326, 130 N. E. 566.

these questions the answer leaves scarcely room for doubt. Unless the insurance company is permitted to bring in the Austrian beneficiary, it will be subject to another suit at the hands of such party. Being free from fault, sound policy would seem to require that the rights of the parties should be litigated in a single proceeding. The mere fact that one of the parties interested is a non-resident should not defeat this policy if the just rights of such party can be properly safe-guarded.

Is it possible to justify such a proceeding under the existing law? Here there may be differences of opinion. We are confronted in the first place with the fact that the common law has taken an extreme attitude in making jurisdiction depend upon personal service.[6] In England this requirement has been greatly relaxed in modern times, and if the action had been brought there, the Austrian beneficiary could have been made a party upon substituted service.[7] The power of the various states of this country to permit substituted service with reference to non-residents is restricted, however, by the Fourteenth Amendment to the Federal Constitution. *Pennoyer v. Neff*[8] has laid down the fundamental rule that judgments *in personam* cannot be rendered against a non-resident upon constructive service without violating the due process clause, the Supreme Court being of the opinion that any other rule would lead to fraud and oppression. But where there is property in the state and the proceeding is started by bringing such property under the control of the court by seizure or some equivalent act, i. e., where it is *in rem* or *quasi in rem,* substituted service is permissible.

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[6] In continental countries jurisdiction is never made to depend upon personal service. A personal suit may be brought always if the defendant has a domicil in the country. *France:* Code of Civil Procedure, art. 59; Garsonnet & Cézar-Bru, *Traité Théorique et Pratique de Procédure Civile et Commerciale* (3d ed. 1912) 845. *Germany:* Code of Civil Procedure, secs, 13, 16; 1 Gaupp-Stein, *Die Zivilprozessordnung für das Deutsche Reich* (11th ed. 1913) 58. *Italy:* Code of Civil Procedure, art. 90.

In addition to such general forum special *fori* exist as regards special classes of cases. For example, in Germany suit may be brought on contracts in the place where the contract is to be performed. Code of Civil Procedure, sec. 29; 1 Gaupp-Stein, *op. cit.* 88; 1 Petersen, *Die Civilprozessordnung für das Deutsche Reich* (5th ed. 1904) 69. In Italy jurisdiction exists either in the place where the contract was made or where it was to be performed. Code of Civil Procedure, art. 91, par. 1. As regards commercial matters, see also Code of Civil Procedure, art. 91, par. 2.

Special restrictions exist sometimes as regards foreigners. 5 Weiss, *Traité Théorique et Pratique de Droit International Privé* (2d ed. 1913) 314. The jurisdiction is, on the other hand, extended at times inordinately in favor of citizens, for example in France. French Civil Code, art. 14; 5 Weiss, *op. cit.* 69, 79.

Concerning the mode of citation where the defendant is without the state, see French Code of Civil Procedure, art. 69, sec. 10, modified by law of May 11, 1900; German Code of Civil Procedure, sec. 199; Italian Code of Civil Procedure, art. 142.

[7] Dicey, *Conflict of Laws* (2d ed. 1908) 243.

[8] (1877) 95 U. S. 714.

If it be asked: What is the distinction between an action *in personam* and an action *in rem* or *quasi in rem,* it is difficult to find an answer that is both accurate and comprehensive. The Supreme Court of the United States has defined a suit *in personam* as one in which "the entire object of the action is to determine personal rights and obligations of the parties."[9] As a broad descriptive statement this definition may be as good as any that can be framed, but it is manifestly too ambiguous to be of much value in the consideration of a particular case. Instead of attempting to operate with definitions, sound conclusions can obviously be more readily reached if we start with the power of a state with respect to all property found within its territory, which includes the power to define and to determine the rights of parties in or concerning such property, irrespective of the residence of such parties. That such power exists with respect to real property and chattels is universally conceded. The dispute relates merely to choses in action. A distinction might be made, of course, between tangible property on the one hand and intangible property on the other. Only the former has a physical situs; the latter can have a situs only in legal contemplation. The contention has been made by an eminent authority that a state has no power to authorize garnishment proceedings in the absence of personal service upon the non-resident creditor or voluntary submission on his part to the jurisdiction of the court.[10] This position is defensible from the standpoint of logic, but it does not meet the practical needs. Because of such practical considerations the Supreme Court of the United States has established the rule that for purposes of garnishment a debt is to be regarded as a thing, a *res,* wherever the garnishee is.[11]

If the state in which the garnishee is served has the power to extinguish the rights of the non-resident against such garnishee upon constructive service, it is not easy to see why the same power should not exist in other than garnishment proceedings, whenever the legislation in question seeks to provide a method for determining who of several claimants is the owner of a chose in action.[12] Granted the desirability of the end, there would appear to be no reason why such an extension should not be made. The ultimate test of what constitutes due process of law is the reasonableness of the legislation and such reasonableness is determined very largely with reference to the social needs in general. So far as the rights of the absentee are concerned, they need not be sacrificed in the least if the power of the state contended for be recognized. The Supreme Court has held in *Harris v. Balk*[13] that the gar-

[9] *Ibid.* 727.

[10] Beale, *The Exercise of Jurisdiction in Rem to Compel Payment of a Debt* (1913) 27 HARV. L. REV. 107, 120.

[11] *Harris v. Balk* (1905) 198 U. S. 215, 25 Sup. Ct. 625.

[12] See COMMENTS (1917) 27 YALE LAW JOURNAL, 252.

[13] *Supra* note 11.

nishee could avail himself of the judgment in the garnishment proceeding in a subsequent suit by his creditor, who had been served merely by publication, only if he had notified him of such proceedings, or if the creditor had otherwise notice thereof in time to protect his rights. For the protection of the non-resident served constructively the same condition should be applied to the insurance company in the case under consideration.

The final question to be determined is therefore whether the legislation of New York constituted a sufficient exercise of the power vested in the state to justify constructive service upon the Austrian beneficiary. The provision of the New York law relied upon in the cases is subdivision 5 of section 438 of the Code of Civil Procedure, which provides as follows:

"An order directing the service of a summons upon a defendant, without the State, or by publication, may be made in either of the following cases:

"5. Where the complaint demands judgment, that the defendant be excluded from a vested or contingent interest in or lien upon, specific real or personal property within the State; or that such an interest or lien in favor of either party be enforced, regulated, defined or limited; or otherwise affecting the title to such property."

The Court of Appeals having held in the *Morgan* Case[14] that the term "specific . . . personal property" included choses in action, it would seem that constructive service upon the Austrian beneficiary in the *Schoenholz* Case constituted due process of law.[15] Whether the plaintiff sues to "impress a lien" upon the insurance policy or seeks to recover the entire amount due under the policy by virtue of an assignment of such policy, can, in the light of the above discussion, produce no difference in the result. The *Hanna* Case,[16] on the other hand, is clearly distinguishable from the *Morgan* Case and the *Schoenholz* Case by the fact that the interpleader proceeding did not fall within the terms of section 438 of the New York Code of Civil Procedure. Similarly to the rule laid down in *Harris v. Balk* it should be held in the instant case, for the better protection of the absentee, that the insurance company shall not be privileged to avail itself, with respect to such absentee, of the judgment and payment thereunder unless it has notified such

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[14] *Supra* note 3.

[15] Under the New York practice, where judgment is given by default against a non-resident who is served by publication, the plaintiff is required to give an undertaking for restitution which will protect such absentee if he is subsequently admitted to defend the action and succeeds in his defence. Code of Civil Procedure, sec. 1216; Rules of Civil Practice, rule 192, subdiv. 5.

Concerning the time within which such absentee may be admitted to defend, see New York Code of Civil Procedure, sec. 445; Civil Practice Act, sec. 217.

[16] *Supra* note 5.

absentee of the pendency of the action or unless such absentee was otherwise informed of the proceedings within the statutory period during which non-resident defendants served by publication may come in and defend. E. G. L.

TAXATION OF SEATS ON THE STOCK EXCHANGE

The prevailing concept of "property" is often rudely tested in taxation cases. The rules laid down in statutes and decisions have often been constructed with the idea that property is a physical *res*—an object of sensation. As such, property would always have a *"situs"*—a relation in space to other objects of sense. But a chose in action is also property, although it is not a thing or *res*—an object of sense. Our concept of property has shifted; incorporeal rights have become property.[1] And finally, "property" has ceased to describe any *res*, or object of sense, at all, and has become merely a bundle of legal relations—rights, powers, privileges, immunities. Such is the case whether these relations affect the consumption and enjoyment of some particular object of sense or not.

It appears that the power of a state to levy a tax often depends upon the *"situs"* of property. We tax "property" whether it is tangible or intangible. Whenever the power to tax depends upon *situs*, we are compelled to find a *situs* for that which under accepted definitions can have none.

In *Anderson v. Durr* (1921) 42 Sup. Ct. 15,[2] the United States Supreme Court held that a seat on the New York Stock Exchange is property and may be taxed in Ohio, where its owner lived, without running counter to the Fourteenth Amendment, in spite of the fact that it may also be taxed in New York. Mr. Justice Pitney finds that membership in the Exchange includes the privilege of buying and selling in the Exchange building; the power of assignment "with qualifications"; a contractual right that the business of the association shall be conducted properly; a right that in dealings with other members commissions shall be determined by a definite rule; a privilege of holding oneself out in Ohio as a member and thereby inducing business; and some interest in the capital stock of a New York corporation owning the land and building in New York City, valued in excess of

[1] A right is never corporeal. Mr. Justice Holmes remarks in his dissent in the case now under discussion: "All rights are intangible personal relations. . . ." *Anderson v. Durr* (1921) 42 Sup. Ct. 15, 18. The same shift that occurred as to "property" no doubt also occurred as to "chose in action." A *chose* is a thing, and no doubt chose in action once meant some *specific* object of sense the possession and enjoyment of which might necessitate an action at law.

[2] Affirming (1919) 100 Ohio St. 251, 126 N. E. 57. See COMMENTS (1920) 29 YALE LAW JOURNAL, 916, discussing the Ohio decision and analysing the "property" involved.

$5,000,000. This valuable taxable property is not wholly *situated* in New York. "The membership is personal property, and being without fixed situs has a taxable situs at the domicil of the owner. *Mobilia sequuntur personam.*"[3]

Mr. Justice Holmes dissented in an opinion of one paragraph.[4] "The fact that all rights are intangible personal relations" does not give Ohio the power to tax either land or personal property "permanently out of the jurisdiction." He seeks for an "object of the right" and he finds it in the New York Stock Exchange building. All else is merely incidental to the "right . . . . personally to enter . . . . and to do business there." Thus the property is "localized in New York. If so, it does not matter whether it is real or personal property or that it adds to the owner's credit and facilities in Ohio. The same would be true of a great estate in New York land."

The analysis adopted by the majority of the Court indicates that some of the legal relations of the owner of a seat have no connection with the New York building as an "object." They do not constitute property in the building. The power of Ohio to tax them is scarcely to be denied merely on the ground that they are "incidental."

A state taxes property because it maintains machinery for determining the existence of rights and privileges, lending its force and machinery to compel performance by those bearing duties and refusing them as against those having privileges. We believe that those should pay who reap the advantage, and that they should pay in proportion to the number and value of their advantages. Whether in the case of land, of chattels, or of choses in action, every state holds its machinery ready for all comers. A resident of Ohio who owns New York land or a New York chattel or who makes a New York contract has Ohio rights as well as New York rights, and has Oregon rights as well as Ohio rights. These various rights (and other relations) are not necessarily identical in either number or character. Shall each state therefore have the power to tax? In theory, yes; and the amount of the tax to be paid each state should be determined by the value received from each state. Practically, however, such a system would be too complicated and expensive.[5] The states that, in general, render the greatest

[3] *Anderson v. Durr, supra* at p. 17.

What are the *mobilia* in this case and how do they follow the domicil? Do the New York rights and privileges cross an intervening state and turn into Ohio rights and privileges? Apparently some of them do not. "Nor is plaintiff's case stronger if we assume that the membership privileges exercisable locally in New York enable that State to tax them even as against a resident of Ohio. Exemption from double taxation by one and the same State is not guaranteed by the Fourteenth Amendment; much less is taxation by two States upon identical or closely related property interests falling within the jurisdiction of both, forbidden."

[4] *Ibid.* 18. Justices Van Devanter and McReynolds concurring.

[5] It may seem surprising that a person who has "property" in any one state has

service are the states where the object or *res* is located and the state of the owner's domicil. Upon one or both of these states is conferred the power to tax, generally to the exclusion of others. The principle upon which the choice is made is not always obvious to a non-expert.[6] The present decision, giving to both states the power to tax, is not in conflict with previous decisions and is not unreasonable.

A. L. C.

AGREEMENTS FOR FICTITIOUS BIDS AT AUCTIONS

The courts generally agree that a puffer at an auction is unworthy of his hire.[1] His employment is considered a fraud on honest bidders.[2] Thus the general rule is that in a "sale without reserve" the employment of a puffer renders the sale voidable at the election of the *bona fide* purchaser.[3] The same result should be reached in a "sale to the highest bidder," for at common law it was considered as a sale without reserve.[4] There is a representation to the public that

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property in forty states: and it may be disturbing to an already unduly harassed property owner to be told that there is a theory by which he may be taxed in forty jurisdictions. The fact is, however, that the question is merely one of sound social policy. There may be some comfort in the assurance that there is still a constitution, and that the time has not yet arrived when it is regarded as "reactionary" to believe that confiscation is not sound social policy.

It is not in the least surprising, however, for an Ohio owner of a seat on the Exchange in New York to learn that he has rights in New York and in Oregon as well as in Ohio, and that Oregon holds its courts and its united strength ready for his service in the same way that Ohio does. All that is necessary is that service of process and other jurisdictional facts should exist. The "rights" recognized and enforced in Oregon may differ in various respects from those in Ohio and in New York. For example, New York may have available procedure *in rem* that is not available in the other states, and a contract held valid in Ohio may be held invalid in Oregon. But there is property in each state, even though it is not identically the same property.

[6] Thus, bank deposits are taxable in two states, although the depositor has only a chose in action. *Fidelity & C. T. Co. v. Louisville* (1917) 245 U. S. 54, 38 Sup. Ct. 40. And although *mobilia sequuntur personam* and are taxable at the owner's domicil, it seems that they cannot be taxed there if they acquire a "permanent" location in another state, such "permanency" being possible even though they remain *movable*. *Union Transit Co. v. Kentucky* (1905) 199 U. S. 194, 26 Sup. Ct. 36. Consider also inheritance and stock transfer taxes.

[1] *Dealy v. Land Co.* (1913) 21 Calif. App. 39, 130 Pac. 1066; *Walker v. Nightingale* (1726, H. L.) 3 Brown P. C. 263.

[2] *National Bank v. Sprague* (1869) 20 N. J. Eq. 159; *Veazie v. Williams* (1850, U. S.) 8 How. 134.

[3] *Howard v. Castle* (1796, K. B.) 6 T. R. 642; *Thornet v. Haines* (1846) 15 L. J. Exch. 230; *Veazie v. Williams, supra* note 2; cf. *Gregory v. U. S. Fidelity Co.* (1904, Sup. Ct.) 45 Misc. 112, 91 N. Y. Supp. 595. The seller cannot avoid a sale where he has employed a puffer. *Troughton v. Johnson* (1804) 3 N. C. 328.

[4] Benjamin, *Sales* (6th ed. 1920) 549; *Parfitt v. Jepson* (1877) L. J. C. P. 529.

the property shall be sold in a market where free, unhampered competition determines who the purchaser shall be.[5] Likewise an agreement between buyers not to bid against each other at a public auction for the purpose of preventing competition or chilling bidding is illegal, and for the same reason.[6] The opposite poles of illegality in bidding are where artificial competition secures a price higher than honest competition would yield, and where stifled competition secures the goods for a price lower than an unhampered market would yield. The dissent from the illegality of either extreme is negligible.

The consideration which moves the few dissenters from the rule against puffing appears to be a desire to shield the seller of property from an unjust price.[7] Something may be said for this position when the auction is an involuntary judicial sale.[8] It has been suggested that no matter what interest one may have in the proceeds of the sale he has a privilege of bidding, provided the sale is not under his control.[9] It seems that when he has an interest in the enhancement of prices, even if he has no control over the sale, his privilege of bidding could easily be abused and work a fraud upon honest bidders because he would profit from the running up of the bids. Yet there are instances in judicial sales where one interested in the sale may

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[5] *Veazie v. Williams, supra* note 2; *McMillan v. Harris* (1900) 110 Ga. 72, 35 S. E. 334; *National Bank v. Sprague, supra* note 2; *Flannery v. Jones* (1897) 180 Pa. 338, 36 Atl. 856; *Peck v. List* (1883) 23 W. Va. 338. In England the attendance of bidders at a sale without reserve forms a contract with the auctioneer that the property will be sold to the highest bidder. *Warlow v. Harrison* (1858, Q. B.) 1 El. & El. 295; cf. *McManus v. Fortescue* [1907] 2 K. B. 1; see *Mainprice v. Westley* (1865, Q. B.) 6 B. & S. 419; Anson, *Contract* (Corbin's ed. 1919) sec. 64; Langdell, *Contracts* (2d ed. 1880) 24. Doubt has been expressed of the correctness of this result. Williston, *Contracts* (1920) sec. 29; Smith, *Sales "Without Reserve"* (1914) 40 L. Mag. & Rev. 173. There is specific legislation in some American jurisdictions that when a sale is advertised to be without reserve the auctioneer cannot withdraw the goods from sale. N. D. Comp. Laws, 1913, sec. 5999; S. D. Rev. Code, 1919, sec. 962; Calif. Civ. Code, 1909, sec. 1796; Uniform Sales Act, sec. 21.

[6] *McMullen v. Hoffman* (1898) 174 U. S. 639, 19 Sup. Ct. 839; (1921) 30 Yale Law Journal, 630; 20 L. R. A. 545, note.

[7] In Texas the illegality of puffing depends upon the animus with which it is carried on. *Reynolds v. Dechaums* (1859) 24 Tex. 174. In Tennessee not only must the employment of puffers be *mala fide*, but in addition it must be shown that the other bidders were actually deceived. *Davis v. Petway* (1859, Tenn.) 3 Head, 667; cf. *Williams v. Bradley* (1871, Tenn.) 7 Heisk. 54. Formerly in equity, contrary to the rule of law, the employment of one puffer was justifiable in England to prevent a sacrifice of the property. An Act of Parliament reconciles equity with common law by making puffing illegal in regard to: sales of land (1867) 30 & 31 Vict. c. 48; goods, Sales of Goods Act (1893) 56 & 57 Vict. c. 71, sec. 58.

[8] The court may set a minimum or reserve price. *Bofil v. Fisher* (1850, S. C.) 3 Rich. Eq. 1; see *Graffam v. Burgess* (1885) 117 U. S. 180, 6 Sup. Ct. 686.

[9] *McMillan v. Harris, supra* note 5.

have a *bona fide* intent to purchase, and his interest in the sale would not be antagonistic to his position as an honest bidder.[10] Under such circumstances he would have no inducement to run up the price. However, it would be only within this small group of judicial sales, where the sales in a number of instances are involuntary, that the owner or one interested in the proceeds of the sale could bid in good faith. There would be no objection to such bidding so long as the bidders stand on the same footing. The difficulty is in determining the good faith of these bids.

Outside of judicial sales of this character, such bidding seems generally to tend toward fraud. The evil of secret fictitious bidding lies in the deception.[11] In any case the owner can expressly reserve a privilege of bidding, or establish by notice a reserve price, and secure himself against a sacrifice.[12] Protection is given to the owner against combinations of bidders to stifle competition, and it follows that bidders should be protected from the owner's conspiracy against them.

The argument that puffers should be permitted to prevent a sacrifice of the property meets with the difficulty that "the value of the thing is what it will bring." A bidder at an auction values the property according to what others offer for it. The owner putting up the property would have his personal opinion of what the property is worth, but a better criterion would be the unhampered auction itself. The auction is the market, and the market value is the highest bid. Here again is the difficulty of determining the good faith of these puffing bids.

The court was presented with an agreement to enhance bids, and not a technical "puffing" agreement, in the recent case of *Jennings v. Jennings* (1921, N. C.) 108 S. E. 340. The plaintiff had been a *bona fide* bidder, it appears, at a partition sale[13] of land belonging to the wife and minor son of the defendant; and in return for increasing his bid to $11,275, in order to persuade *bona fide* bidders to run up their bids, the defendant contracted to give him a share of the higher bids. The

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[10] As, for instance, a sale upon dissolution and winding up of a partnership, or a partition sale where a partner or a co-owner desires bona fide to buy the property. Of course where all the partners or co-owners unite in bidding or hiring others to bid for them, their interest would lie in securing the highest price possible and this would rebut the good faith of the bids on their part.

[11] *Pittsburgh Dredging & Construction Co. v. Monongahela & Western Dredging Co.* (1905, C. C. W. D. Pa.) 139 Fed. 780.

[12] *Parfitt v. Jepson, supra* note 4; Uniform Sales Act, sec. 21; see *Thornet v. Haines, supra* note 3.

[13] The rules applicable to an ordinary auction apply to a partition sale, and to all judicial sales, except where such sale is specifically authorized to be private. The only difference which actually exists between an auction and a judicial sale is that the latter requires the approval of the court. *Anderson v. Wis. Cent. Ry.* (1909) 107 Minn. 296, 120 N. W. 39.

plaintiff made a still higher bid of $11,830, and sold this bid[14] to a third party without the knowledge or privity of the defendant. He sought to recover the stipulated share of the difference between his bid of $11,275 and the amount of the bid he sold to the third party. If the plaintiff can be considered a puffer, the whole difficulty is ended. But assuming that he was not a puffer, is it an instance of an illegal secret interference to artificially create competition by fictitious bids? It is to be observed that the plaintiff would have had a refund under his contract with the owner for a share of any bid which he might have made, if such bid exceeded $11,275. No bid of his, therefore, above $11,275 could be considered *bona fide*. Each bid in excess of the agreed price was, to the extent of the agreed share of remuneration, fictitious. In reference to puffing his position was anomalous,[15] for if his bid had been accepted he could have been compelled to complete the sale, and still his financial responsibility was less in every case than that of his fellow bidders. He enjoyed a favor so far as his own liability was concerned. If the property had been knocked down to a higher bidder, part of the price paid would have gone to the plaintiff. The higher the accepted bid of a *bona fide* bidder, the greater his reward. It was specifically understood by the parties that the agreement should be kept secret.

The Court was doubtful of the "wisdom and propriety" of the contract; but since the rights of third parties did not intervene, they treated the contract as valid and held that the plaintiff by selling his bid to the party failed to perform his part of the contract. He had defeated the purpose of the contract, namely, a sale to the highest bidder. There was nowhere in the agreement a prohibition of such sale by the plaintiff, nor was the aim of the contract stated to be for the purpose of selling to the highest bidder. Undoubtedly this was the

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[14] The Court says "he acquired the position of advantage as a bidder, and the right to sell his bid under the contract . . . ." It is well settled that a bid is only an offer, and may be withdrawn at any time before it is accepted by striking off the property to the bidder. *Payne v. Cave* (1789, K. B.) 3 T. R. 148. The principle applies to judicial sales. *Hibernia Savings & Loan Soc. v. Behnke* (1898) 121 Calif. 339, 53 Pac. 812. The highest bidder at a judicial sale is only preferred and has no independent rights. *Perry v. Perry* (1920) 179 N. C. 445, 102 S. E. 772. It does not appear in the instant case that the plaintiff's bid had been accepted, certainly not confirmed by the Court, for the plaintiff sold out upon his vendee's threat to raise the bid. It is doubtful if the plaintiff had anything to sell. Where a successful bidder at a judicial sale sold his bid before confirmation by the court, the sale was held to be void. *Camp v. Bruce* (1898) 96 Va. 521, 31 S. E. 901; 16 R. C. L. 75.

[15] One who makes fictitious bids at an auction is not a puffer, if, in case his bid is last and highest, he can be compelled, by the person conducting the sale, to take and pay for the property. *McMillan v. Harris, supra* note 5. Puffing and bybidding are the same.

end desired, but it was a part of the contract only by implication. The sole specific requirement for his performance was to bid a certain price and as a reward he was to receive a share of all higher bids.

It seems that a better ground for the decision would have been the illegality of the contract. The fact that the agreement was made for the purpose of enhancing the bids does not render it less odious than an agreement to chill bidding. The Court thought it "close akin to the employment of by-bidders,[16] which is violative of the implied guaranty that all bids at public sales are genuine. . . . ." Both the owner and the bidders are required to act in good faith.[17] It does not appear anywhere that the property would have been sacrificed at an unjustly low price. And while the purpose of the agreement was to increase the bids at the sale, its effect was to create a false appearance of competitive bidding.[18] In the efiforcement of such an agreement the law would be the instrument of executing a deceptive design.[19] Any conduct of those engaged in selling or bidding which prevents fair, free, and open sale is fraudulent and contrary to common morality, square dealing, and commercial integrity.

The dangers involved in the confiscation of the private property of the citizens of enemy countries are suggested by the recent disclosures in connection with the repudiation by China, on her entrance into the recent war, of the Hu Kuang Railway bonds issued in 1909 in Germany. It appears that some of these bonds have reached the hands of citizens of allied or neutral countries, and a great protest, including a threat of refusal of future loans to China, has gone up. Possibly some of these bonds were bought up after 1917 at low prices in the expectation that China could after all be persuaded to pay them.

However lawless the proceeding of repudiation of bona fide obligations, China merely anticipated the action of the Great Powers in the Treaty of Versailles reserving the power, of which France, Great Britain and in part Italy have already availed themselves, to confiscate the private property and investments of ex-enemy nationals. Nothing more subversive of the stability of international commercial relations, the integrity of investments, the mobility of capital and peaceful devel-

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[16] By-bidding is defined, "Bidding with the connivance or at the request of the vendor of goods by auction, without an intent to purchase, for the purpose of obtaining a higher price than would otherwise be obtained." 1 Bouvier, *Law Dictionary* (8th ed. 1914) 407.

[17] *Barnes v. Mays* (1891) 88 Ga. 696, 16 S. E. 67; *Veazie v. Williams, supra* note 2; *Bexwell v. Christie* (1776, K. B.) Cowp. 395.

[18] Cf. *Pittsburgh Dredging & Construction Co. v. Monongahela & Western Dredging Co., supra* note 11.

[19] *Ibid.*

opment of international intercourse could have been introduced into a twentieth century treaty than the provision just mentioned. Yet some of the men who have most vigorously protested against the confiscatory acts of China, and of Soviet Russia as well, are among those who sanctioned the confiscation clauses of the Treaty of Versailles. The shoe is now merely on the other foot. As a matter of fact, the policy of confiscation of ex-enemy private property, now revived in a stressful period of mental aberration after a full century of desuetude, is a two-edged sword, and there is never any assurance that it will always swing in one direction. With the steady growth in American investments abroad, it seems hardly conceivable that any respectable opinion in the United States should be found in approval of the short-sighted policy of confiscation or indefinite retention of ex-enemy private property. The unfortunate effects of the exploitation of this precedent are incalculable. American holders of the bonds of and investors in possible enemy countries are in danger of losing their investments out of hand. Their chances of recovery of any equivalent will depend upon the success in arms of their own country. The inconsistency of this position with any movement for the limitation of armaments will be readily appreciated.

As if divorce were not scandalously easy to obtain, one wealthy and irritated wife has sought to oust her clinging spouse from her premises on the ground that he is a "squatter."[1] He had exercised the only remaining privilege of dominion left to the male, the choice of the matrimonial domicil,[2] and had considerately chosen his wife's estate. The complaint was futile[3]; *Domus sua cuique est tutissimum refugium.*

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[1] *Marshall v. Marshall* (1921, Co. Ct.) 116 Misc. 249, 190 N. Y. Supp. 318.

[2] Schouler, *Domestic Relations* (6th ed. 1921) sec. 40; *Buckholz v. Buckholz* (1911) 63 Wash. 213, 115 Pac. 88.

[3] *Cipperly v. Cipperly* (1918, Co. Ct.) 104 Misc. 434, 172 N. Y. Supp. 351.